

# expert update

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## Referee's red card overturned on appeal

*Carbotech-Australia Pty Ltd & anor v Yates & 14 ors [2008] NSWSC 54*

In *Judge shows Referee red card* (2008, Issue 5 of this publication) we examined the issues for an expert acting in the capacity of Referee arising from Associate Justice McLaughlin's decision in *Carbotech Australia Pty Limited and Anor -v- Ian Kenneth Yates and Ors [2007] NSWSC 1304*.

In that case, his Honour found that the Referee ought to have 'observed concepts of natural justice in preparing his opinion', and therefore that his report must be rejected, on the basis of the principles of procedural fairness. His Honour considered it to be the fact of the e-mails and the telephone conversations passing between the Referee and the solicitors for only one party, and not the content of those e-mails and the telephone conversations, which constituted the ground for apprehended bias in the mind of an objective observer or disinterested bystander.

However, earlier this month Justice Brereton issued a judgment setting aside the decision of Associate Justice McLaughlin. In common with the earlier judgment, some important guiding principles emerge for any expert called to act in the capacity of Referee.

In particular, Justice Brereton considered the question of whether McLaughlin J. erred in concluding that there was a reasonable apprehension of bias on the part of the Referee arising from his communications with the solicitors for the plaintiff. In doing so, he drew upon a number of earlier judgments to reiterate some important guiding principles:

- A Referee is bound by the rules of natural justice
- A Referee is not required to conduct his inquiry as if it were a trial by a judge
- Subject to any directions of the Court, the Referee may conduct proceedings in such manner as he thinks fit

*'The Referee was not a lawyer, let alone a judge, and while qualified to give the expert opinion sought of him, was apparently unfamiliar with the procedures and protocols involved with litigation'*

- The Referee must be actually and apparently impartial, and an appearance of impartiality may be compromised if the Referee has private dealings with one of the parties
- The Referee is not bound by the rules of evidence but is at liberty to inform himself in such manner as he thinks fit
- The referee must not hear evidence or receive representations from one side behind the back of or in the absence of the other

His Honour dealt with an apparent contradiction between this latter principle, and the relevant rules which permit the Referee to “inform himself ... in relation to any matter in such manner as the Referee thinks fit” and “to communicate with expert retained on behalf of the parties or any of them”. He commented that:

‘... such an order is not to be understood as permitting a Referee to have a private conversation with one expert. He may call the experts for opposing parties together to seek clarification, or he may arrange a conference telephone discussion with the experts for competing parties. ...the Referee may be permitted to carry out his own tests. But if he does so, prior to preparing his “just opinion” he must give, in most cases, the information so derived to the competing parties to permit them to express their views upon it to him. There is nothing in Pt 72, r 8, or in the usual order made by the Court ... which permits private discussions between the Referee and only one party or his expert. Similarly, normally if communications are received by a Referee from a party they should be provided to the other party, unless it has previously been arranged that the party providing a document to the Referee will also provide it to his opponent.

Further, his Honour felt that the submission that a reasonable bystander would conclude that there was actual bias was misconceived, because actual bias depends not upon the impression of any reasonable bystander, but upon proof that the decision-maker was actually biased. The mere fact that an ex parte communication took place was important, but not decisive. Whether communications between a judicial officer and one party to the exclusion of the other gives rise to a reasonable apprehension of bias is dependent on the facts of each case.

In this case, the facts surrounding the communications included that:

- 'The matters entrusted to the Referee did not require him to engage in the receipt and evaluation of competing cases, evidence and submissions...It is a function that required scientific expertise, but not one which lent itself to shades of opinion or persuasion...Though appointed as a Referee, his function was much more akin to that of a court expert witness.'
- 'The orders contemplated that there would be single-party communications, and that the Referee would list them (as he did) in his report.'
- 'The Referee was not a lawyer, let alone a judge, and while qualified to give the expert opinion sought of him, was apparently unfamiliar with the procedures and protocols involved with litigation.'

His honour concluded that:

' Appreciating all these matters, and the Referee's naivety in matters of legal protocol and procedure, the reasonable observer would have concluded that the Referee's inquiry of [the plaintiff's solicitors] did not manifest a disposition in favour of their client, but a desire to be satisfied that he had done what was required of him by the reference.

Accordingly, in my respectful opinion, the learned Associate Judge erred in concluding that a reasonable apprehension of bias arose from the mere fact of the single party communications, without examining the context and content of the communications. Upon such an examination, I conclude that no reasonable apprehension of bias arose.

...while the mere fact of those communications is relevant, it is necessary to go beyond that and to view the context and content of the communications. When that is done, in the circumstances of this reference – particularly the nature of the reference and the Referee – they do not found a reasonable apprehension of bias.'



## Significance

This judgment provides useful guidance on the manner in which experts acting in the role of Referee ought to conduct the reference.

As commented on in relation to the earlier judgment, our observation is that all experts, and particularly those without a solid legal grounding, will need to be mindful of the intricacies of the Reference process and the manner in which they communicate with the parties and the Court, and how procedural issues such as the retainer and confidentiality of information are dealt with.

The disparity in judicial views in this case serves to underline how important it is that the Referee appreciates these considerations.



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